



February 21, 2019

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James A. Donahue, III
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**Re: Commonwealth of Pennsylvania by Josh Shapiro, Attorney General, et al. v.
UPMC, A Nonprofit Corp., et al.**

Dear Jim:

Pursuant to Rules 1023.1-1023.4 of the Pennsylvania Rules of Civil Procedure, we are providing you with notice of matters alleged in your Petition to Modify Consent Decrees that have no evidentiary support whatsoever, are not warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law, or appear to be included for an improper purpose. More specifically,

1. The OAG previously admitted that it cannot force UPMC to contract against its will. The basic premise of the OAG's Petition and the principal relief sought on each count is to force UPMC hospitals to enter into contracts with Highmark (and every other willing payor) and to force the UPMC Health Plan to enter into contracts with Allegheny Health Network (or any other willing provider) at rates and on terms determined by outside arbitrators, or to impose this regime by requiring UPMC to provide healthcare services to everyone, regardless of whether there is a provider contract, at in-network rates. But, the OAG has specifically admitted that it has no legal authority to force UPMC to contract with Highmark—that was the basis for the negotiating mutually-agreed reciprocal consent decrees with UPMC and Highmark (collectively the "Consent Decree") in the first instance. You moreover specifically testified to this before the Democratic Policy Committee of the Pennsylvania House of Representatives on October 10, 2014. In that testimony, you defended the Commonwealth's strategy in securing the Consent Decrees with UPMC and Highmark by explaining that the Commonwealth could not force UPMC to contract with Highmark or anyone else. You testified that the OAG evaluated whether it could "force UPMC and Highmark to contract with each other," and "concluded that we could not" because "there is no statutory basis to make UPMC and Highmark contract with each other." We called this testimony to your attention on January 31 and were therefore surprised to see the contrary assertions in your Petition when it was filed a week later. Any assertion that your office has the authority to compel contracts between UPMC and Highmark should therefore be withdrawn.

2. The core allegations in the Petition were released in the Consent Decree. As alleged in the Petition, the “Patients First Initiative” was formed by the Commonwealth “to resolve the disrupted health care and In-Network access issues presented” in 2014 by the impending end of UPMC’s provider contracts with Highmark. (¶ 18.) The end result of that initiative was the Consent Decree, which comprehensively addressed the wind-down and eventual termination of the UPMC/Highmark relationship, and “release[d] any and all claims the OAG, PID or DOH brought or could have brought against UPMC for violations of any laws or regulations within their respective jurisdictions, including claims under laws governing non-profit corporations and charitable trusts, consumer protection laws, insurance laws and health laws relating to the facts alleged in the Petition for Review or encompassed within this Consent Decree for the period of July 1, 2012 to the date of filing.” (Consent Decree §IV.C.5.) The OAG’s Petition nonetheless rests almost entirely on a recitation of clearly released allegations, including:
- a. The dispute regarding Highmark’s Community Blue plan, which occurred during 2013 and which was expressly resolved by the Consent Decree, (see Petition ¶¶ 16-18, 96, 103, 107, 118);
 - b. Allegedly misleading marketing campaigns regarding access to UPMC physicians for Highmark subscribers, which occurred in the course of the Community Blue dispute. (See *id.* ¶ 17.) The Consent Decree expressly resolved and addressed this by requiring UPMC and Highmark to jointly pay into a Consumer Education Fund for the Commonwealth to inform consumers about the end of the UPMC/Highmark relationship, (Consent Decree § IV.B);
 - c. The compensation of UPMC’s executives and location of its headquarters, both of which were in place long before the Consent Decree went into effect on July 1, 2014, (see Petition ¶ 60);
 - d. Various, allegedly revenue-increasing practices — including transferring procedures to specialty providers, charging provider-based fees, and charging Out-of-Network patients for the unreimbursed balance of the services they receive — all of which predated, and were specifically addressed by, the Consent Decree, (see *id.* ¶ 31; Consent Decree §§ IV.A.8 (regulating transfer of patients), IV.A.3 & IV.A.4 (regulating balance billing), & IV.C.1 (setting a schedule of billing rates in the absence of a negotiated rate)); and
 - e. Most importantly, UPMC’s refusal to contract with Highmark to provide In-Network access to Highmark enrollees. (See Petition ¶¶ 27-29, 106, 107, 117, 119.c.) As discussed above, the Consent Decree and the Mediated Agreement that predated it were occasioned by UPMC’s decision to terminate its relationship with Highmark. (See *id.* ¶¶ 12-18.) The Consent Decree was put in place to implement the separation over time — UPMC’s efforts to initiate that separation *necessarily preceded* and were covered in the Consent Decree.

Not only did your Petition not even mention the Release contained in the Consent Decrees it was seeking to “modify,” it proposes a modified decree that deletes the

Release entirely. Clearly the failure of your Petition to account for the Release and the deletion of that Release from the proposed "modification" cannot be squared with good faith and should be rectified by withdrawal of those claims in the Petition that have been released.

3. The allegations regarding UPMC Susquehanna (§§ 38-41 & 104) have no evidentiary basis. The Petition alleges a sequence of events involving UPMC Susquehanna, PMF Industries (also referred to as "a Williamsport area manufacturing business"), and PMF's unnamed "insurer." (Petition ¶ 38.) It proceeds to allege that PMF "purchase[s] health insurance" for its employees from this "insurer," which in turn tries to contract with providers for "Reference Based Pricing." The refusal of UPMC Susquehanna to enter into these contracts with PMF or its insurer is then cited as a supposed violation of the Nonprofit Corporations Law ("NCL") and Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). In fact, as you must know, PMF's "insurer," INDECS, is not an insurer at all, but rather a self-styled "third-party administrator" that does not engage in reference based pricing. It instead arbitrarily decides on an ad hoc basis how much to pay for a service already rendered to a patient without any reference to the hospital's charge, Medicare/Medicaid rates, or any other published rate schedule. It is moreover operated by a convicted felon and has been sanctioned for misconduct in both New Jersey and New York. The allegations regarding UPMC Susquehanna are false, have no evidentiary basis, and should be withdrawn.
4. The allegations regarding out-of-area BCBS companies (§§ 42-43) are false. The Petition alleges that UPMC "decide[d] to not participate" in the networks of out-of-area Blue Cross Blue Shield ("BCBS") companies. That, as you must know, is false. In fact, UPMC has repeatedly offered to enter into full in-network provider contracts with these out-of-area BCBS companies, but they have refused to contract with UPMC because of the Blue Cross Blue Shield Association's ("BCBSA") illegal and anticompetitive market allocation rules for its affiliated companies, which are enforced in Western Pennsylvania by Highmark, precluding out-of-area BCBS companies from contracting with UPMC. UPMC is currently seeking an injunction in the U.S. District Court for the Northern District of Alabama against enforcement of those rules, which have been declared *per se* violations of the Sherman Act. UPMC demands that the OAG withdraw the false allegations in paragraphs 42-43, and would welcome the OAG to join in the effort to undo the BCBSA illegal market allocation compact.
5. The OAG contends that the expansion of UPMC (§§ 64-70) will allegedly harm more patients, but the OAG reviewed and did not object to these transactions. The Petition alleges that "[t]he effects on the public of UPMC's conduct were previously limited to the greater Pittsburgh area[, but] with its expansion across the Commonwealth, even more patients will experience these negative impacts," (Petition at 35), and that "its potential to deny care or increase costs will impact thousands more Pennsylvanians," (¶ 70). As the OAG knows, however, the refusal of certain UPMC hospitals to contract with Highmark is and always has been limited to Allegheny and Erie Counties, where Highmark owns and operates a competing hospital system, and thus does not extend to hospitals outside of those areas. Moreover, the OAG reviewed each of these transactions (up to and including the transaction with Somerset Hospital, which closed on February 1, 2019)

for compliance with both charitable trust law and antitrust law and, with the exception of Jameson Health System, made no objection. In the case of UPMC Jameson, moreover, the OAG litigated its objections and lost. The allegations concerning potential harm caused by UPMC's expansion are therefore unfounded and should be withdrawn.

To bring your filing into compliance with Rules 1023.1-1023.4, please withdraw or correct the above-noted errors within twenty-eight days of the date of this letter.

Sincerely,

COZEN O'CONNOR

By:  Stephen A. Cozen

SAC:jdb